

IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER..

I.T.A. Nos. 516, 517 & 518/Nag/2014.
Assessment Year : 2003-04, 2004-05 & 2005-06.

Late Shri Shyam Anand Moundekar,
L/H Smt. Nalini Shyam Moundekar,
Nagpur.

PAN AICPM6255D.

Appellant.

The Income-tax Officer,
Ward-4(1), Nagpur.

Vs.

Respondent.

Appellant by : Shri K.P. Dewani.
Respondent by : Shri A.R. Ninawe.

Date of Hearing : 23-03-2017.
Date of Pronouncement : 27th March, 2017.

ORDER.

PER BENCH:

At the outset we note that there is a delay of 202 days in filing these appeals by the assessee for the concerned assessment years. In the application for condonation of delay the assessee has contended as under :

1. The appeals filed by assessee are beyond time. The delay in filing appeals has been caused under peculiar circumstances which were beyond the control of assessee.
2. The first appeals were represented by late Shri M. Mani, Advocate before CIT(A)-1, Nagpur in the months of December, 2013 to February, 2014. The appeals of assessee came to be disposed off by dismissal by Hon'ble CIR(A)-1, Nagpur vide order 14/02/2014. The appellate order were received by Advocate late Shri M. Mani on 28/03/2014.
3. Late Shri M. Mani, Advocate was seriously ill and ultimately has expired on 18/10/2014. The aforesaid appellate orders received by Advocate M. Mani were misplaced in his office on account of his illness which resulted into his death after a short time. The aforesaid

appellate orders were forwarded to assessee's office in the first week of December, 2014 by the staff in the office of Advocate Shri M. Mani after demise of Shri M. Mani, Advocate. The assessee after receipt of orders has got prepared appeals and filed the same on 15/12/2014. The delay of 231 days in filing appeals is for the detailed reasons as explained hereinabove. The assessee has acted promptly and diligently and immediately filed appeals soon after the knowledge of appellate orders was made known to her.

4. It is respectfully submitted that delay occurred under the aforesaid peculiar circumstances constitutes a reasonable and sufficient cause. The delay was on account of demise of the counsel and failure on part of staff in office of late counsel to inform assessee about the fate of appeals which constitutes reasonable and sufficient cause. In view of above assessee could not be said to be negligent and hence there could be no intention for delay in filing appeals.
5. It is settled law that the expression "sufficient cause" within the meaning of section 5 of Limitation Act should receive liberal construction so as to advance substantial justice when no negligent or inaction is imputable to party. In the facts of the present case no negligence on the part of assessee can be seen. The assessee places reliance on the decision of Hon'ble Apex Court in the case reported at 167 ITR 471 (SC) in the case of Collector, Land Acquisition vs. Mst. Katiji & Ors.
6. The assessee encloses herewith letter received from Shri Mahavir Atal delivering appellate orders on 03/12/2014 and also explaining the reason for delay in communication of appellate orders to assess.
7. In view of above, it is humbly submitted that delay occurred due to demise of counsel and failure on the part of staff in the office of the deceased counsel to communicate about the fate of appeals and to take action for filing appeals. It is sufficient cause for condonation of delay in filing appeals.
8. Considering the above factual position, it is humbly prayed that the delay in filing the above appeals be condoned and appeals be admitted for adjudication on merits."

2. We have heard both the counsel on the issue of condonation of delay. We find that the reasonable cause has been attributed to the illness and death of the earlier Advocate Shri M. Mani. Considering the overall facts and circumstances of the case, we condone the delay and hence the appeals are admitted.

3. At the outset we note that one common issue raised in all these appeals is the assessee's challenge to the validity of reopening. The common grounds in this regard are as under :

1. The notice issued u/s 148 of I.T. Act, 1961 is illegal, invalid and bad in law and consequent assessment framed u/s 144 r.w.s. 147 of I.T. Act, 1961 is liable to be cancelled.
2. The notice issued u/s 148 of I.T. Act, 1961 in the case of assessee has not been served on assessee in accordance with law and the consequent assessment framed thereupon is illegal, invalid and bad in law and liable to be cancelled.
3. Reasons recorded for issue of notice u/s 148 of I.T. Act, 1961 having not been provided to assessee the assessment framed is liable to be cancelled.
4. No reasonable opportunity of being heard is provided to assessee and this consequent assessment framed thereupon is liable to be cancelled.

4. At the outset in this regard learned counsel of the assessee submitted that the assessee's challenge to the validity of jurisdiction qua invalidity of service of notice is on identical facts as in the case of another assessee of the same group, namely, Arunkumar Anandrao Moundekar in ITA Nos. 274 & 275/Nag/2015 vide order dated 5th January, 2017. Learned counsel submitted that the facts of the case and the order of learned CIT(Appeals) qua this issue is identical as in that case. Learned counsel submitted that in the said case this Tribunal had quashed the assessment on the ground of lack of validity of notice. Hence learned counsel submitted that the same may be followed.

5. Per contra learned D.R. though supported the order of learned CIT(Appeals) but did not dispute the fact that the circumstances in the present case and the facts therein are similar to the one dealt with by this Tribunal in the case of Arunkumar Anandrao Moundekar (supra).

6. We have carefully considered the submissions and perused the records. In this regard we may gainfully refer to the adjudication by the Tribunal in the above case as under :

“9. Brief facts of the case encompassing the issue relating to the issue of notice and the assessee’s challenge thereof has been recorded by the AO in the assessment order as under :

“ A survey action u/s 133A was conducted in the Moundekar Group on 24.11.2008. During the course of survey proceedings, some documents pertaining to assessee and his business were found and impounded. A copy of all such documents was given to the assessee.

2. Thereafter, notice U/s 148 in the case for the below mentioned A.Ys. were issued by the ITO Ward 4(2), Nagpur, and served by way of affixture, on the below mentioned dates.

Name of assessee.	A.Y.	Date of service of notice.
Sh. Arun A. Moundekar	2003-04	26.3.2009
Sh. Arun A. Moundekar	2004-05	26.3.2009
Sh. Arun A. Moundekar	2005-06	26.3.2009
Sh. Arun A. Moundekar	2006-07	26.3.2009
Sh. Arun A. Moundekar	2007-08	26.3.2009
M/s Laxmi Anand Builders & Developers.	2003-04	26.3.2009
M/s Laxmi Anand Builders & Developers	2004-05	26.3.2009
Smt. Vandana Moundekar.	2007-08	26.3.2009

3. The notices were sent for service through a notice server but the assessee refused to accept the notices. Hence, an Inspector of Income Tax was also sent along with the notice server to get the notices served on the assessee. The Inspector of Income Tax served the notices by affixture. The notices served and a copy of the Inspectors report is made part of the order as Annexure 1 & 2 resp.

4 The case was assigned U/s 127 of the Income Tax Act, 1961, to the OTO the ITO Ward 4(1), Nagpur in the month of July, 2009. Then, on 18.7.2009, a letter was sent to the assessee confirm whether the assessee has filed in response to notice U/s 148 and if not to show cause as to why

prosecution proceedings U/s 276 CC should not be initiated for willful failure to file the return of income. The assessee vide this Office dated 21.7.2009 submitted that assessee has not received the notices issued U/s 148 of the Income Tax Act, 1961. Then on 22.7.2009, the assessee was informed that the notices U/s 148 of the Income Tax Act were duly served in your cases for the below mentioned Assessment Years on 26.03.09, by way of affixture, in the presence of two witnesses. This office has all the necessary evidence to prove that the notices u/s 148 has been properly served: The assessee vide his reply dated 29.7.2009 still maintained that the notices have not been received by the assessee. Then on 5.8.2009, a notice U/s 142(1) was again sent to the assessee mentioning all the details that:

“ A survey action u/s 133A was conducted in your? Case on 24.11.2008. During the course of survey proceedings/ some documents pertaining to you were found and impounded. A copy of all such documents has already been given to you. Considering your reply dated 29.7.2009/ your returns tiled u/s 139 and the documents found and seized during the course of survey are considered as the material available on record and it is proposed that assessment would be completed by affording you of an opportunity of being heard to state your case and to explain the documents found and impounded during the course of survey U/s 133A of the IT. Act, by way of issue of this notice u/s 142(1).)

In the same notice certain basic documents were also called for, which are as under:

- (i) A copy of return of income filed U/s 139 for the A. Ys. 2003-04 to 2007 -08, along with all the supporting documents.
- (ii) A note on business activity.
- (iii) Books of accounts for the A.Ys. 2003-04 to 2007 -08. A copy of bank a/ c statement for the A. Vs. 2003-04 to 2007 -08.

5 However instead of filing these basic documents, the assessee again objected to the service of notices. On 17.8.2009, the Counsel of the assessee appeared and filed letter of authority> The counsel was told that the Department has all the necessary evidence to prove that the notices U/s

148 have been properly served. The Inspectors report. do clarify that the assessee refused to accept the notices and the notices were also teared off when affixed. In fact, the ITO Ward 4(2), Nagpur, in his remarks has also noted that after the notices were served by affixture, the assessee as well *as* his Counsel was very well informed that the notices U/s 148 were served by affixture and to accept the same. Annexure 1 & 2 does settle the contention of the assessee that notices were not served. Even the counsel of the assessee was shown Inspectors report and also a notice U/s 148 to justify that the notices have been properly served. In fact, the conduct of the assessee do indicate the intentions of the assessee not to cooperate with the Department and to create unnecessary litigation without any base' or truth, considering the fact that even after being informed by the A. O. about the service of notices by affixture.

6. But till the date' of the order the assessee has not submitted any of the above called for documents, except for reiterating the fact that notices U/s 148 have not been served and the A. O. cannot issue notices 142(1) calling for documents pertaining to 2 period more than three years prior to the previous year.

7. An adjournment was Sought for on 17.8,2009 and the date was fixed for 20.8.2009. Again on 20.8"-2009, adjournment was requested and the case was adjourned for 27.8.2009. A,9;ain on 27.8.:2009. adjournment was sought for and the case was adjourned to 2.91.200J. None attended on 2.9.2009 and no submission "pas furnished. Again a notice U/s 142(1)) and notice U/s 274 r. w. s. 271 (1) (b) was issued on 20.10.2009, fixing the case for hearing on 30, 10.2009 and *also* a summons U/s 131 was issued

on 27.10.2009 to produce all the documents called for vide notices issued U/s 142(1). As expected, no documents, as called for. vide notices issued U/s 142(1) were filed. On 3.11.2009, the assessee attended without any of the documents called for by the Department. Still, a statement U/ s 131 was recorded and the assessee was specifically asked to produce all the documents latest by 6.11.2009. The assessee assured to explain all the impounded documents on 6.11.2009 but neither the assessee nor the Counsel for the assessee attended nor any explanation/documents were filed, except for adjournment letter.

8 From the above narrated facts, it can be inferred that the assessee has scant regard for the Income Tax proceedings and has no explanation to file before the Department in respect of the queries raised/ explanation sought on impounded documents by the Department, hence. it was proposed to the assessee vide this Office notice dated 6.11.2009 to complete the assessment U/s 144 of the I. T. Act. For passing order U/s 144, it was informed that the return of income filed U / s 139 and the books and documents impounded during the course of survey are being considered as material available on record. He was further informed that this being the last opportunity offered to you and the addition on the points mentioned in the notice was proposed. It was mentioned that if the assessee wants to state anything, he should give it in writing with documentary evidence by 16.11.2009. On 16.11.2009, the assessee submitted a letter that he has made an application under RTI for supply of Inspectors report and a copy of notice U/s 148. The assessee vide this Office letter 16.11.2009, was categorically made aware that the proceedings under the Income Tax Act and RTI are separate and I. T. proceedings cannot be stalled. He was also made aware that the assessee can very well come and peruse the records of the Department in respect of service of notices and was also informed that the Department is not willing to complete the proceedings without giving you an opportunity of being heard. He was also informed that the reasons for reopening cannot be given to you as you have not filed any return of in response to notice U/s 148 and the Department is bound by the decision of the Apex Court reported in 259 ITR 19. The final opportunity was granted to the assessee for 20.11.2009. None attended on 20.11.2009 but the Counsel of the assessee appeared on 23.11.2009 and again reiterated that notices have not been served.

10. Upon assessee's appeal learned CIT(Appeals) affirmed the AO's order in this regard by making following observations :

“5.1 The A.R. of the appellant has filed a written submission wherein the AR has mainly challenged the validity of the service of notice u/s 148 through affixture, hence contended that the notice served u/s 148 is not a valid service. The AR of the appellant contended that since there is no

valid service of notice, therefore, there is no valid assumption of jurisdiction of passing the order u/s 144 of the Act. Therefore, the appellant has challenged the consequential order passed u/s 144 by way of making additions as bad in law. The assessee has placed reliance on the judgement of Hon'ble Apex Court in the case of CIT vs. Tayab Ali Mulla Jivaji Kapasi reported in 66 ITR 147 (SC). The A.R. of the appellant has also referred to the provisions of Sec. 282 of the IT Act, 1961. The contention of the AR is that notice u/s 148 has not been served by post. Further, the AR states *“provision for service of summon issued by Court under the Code of Civil Procedure are provided in order V of Civil Procedure Code. The aforesaid provision provides the procedure required to be followed for valid service of summons under various rules contained in Order V. On the basis of facts and evidence on record, the procedure prescribed under Order V of Civil Procedure for service of notice by affixture has not been complied with in the case of the assessee. In view of the above, there is no valid service of notice issued u/s 148 of the I.T. Act, 1961.”*

5.2 The appellant has also placed reliance on the decision of ITAT, Amritsar Bench in the case of DCIT Vs. K.G. Singhania in ITA No. 281/282/ASR/2008 reported in 126 TTJ 373 and decision of ITAT, Agra Bench reported in 126 TTJ (AGR) 346. Thus, based on these judgements the assessee has submitted that the jurisdiction assumed by the AO u/s 144 is bad in law as there was no valid service of notice u/s 148 of the I.T. Act, 1961.

6. I have carefully considered the submissions of the AR and the order of the AO.

6.1 A survey action u/s 133A of the I.T. Act, 1961 was conducted in the Moundekar Group of Cases on 24.11.2008. During the course of Survey action, documents pertaining to the business of the assessee were found, which were impounded. The copies of the documents impounded were provided to the appellant by the AO. The assessment was re-opened by issue of notice u/s 148 within the meaning of Section 147 of the Act. Notice u/s 148 was issued and served on the appellant on 26.03.2009. The notices were first time sent simultaneously for AYs 2003-04, 2004-05, 2005-06, 2006-07 & 2007-08 through the Notice Server. The AO in Para 3 of the assessment order has recorded a finding that since the assessee denied to accept the notice from the Notice Server, an Inspector of Income Tax was deputed to effect the service on the assessee by way of affixture. The proof of service of notice and the copy of Inspector's Report are forming the part of the assessment order as Annexure 1 & 2, respectively. Subsequently, a notice u/s 142(1) dated 18.07.2009 was issued calling for explanation of the assessee on the impounded

documents. Notice was sent by RPAD to the assessee but the assessee choose not to reply to the notice and objected to the service of notice u/s 148 made by affixture. Subsequently, there was a change in the jurisdiction of the case to the ITO Ward 4(1), Nagpur in the month of July, 2009. On 05.08.2009 Notice u/s 142 was again issued to the assessee calling for the details asked for vide notice dated 26.03.2009 which remained un-complied. Once again instead of filing the relevant details, the assessee objected to the service of notice by affixture. The relevant finding of the AO as recorded in Para 5 of the assessment order is reproduced below :

“ A survey action u/s 133A was conducted in your? Case on 24.11.2008. During the course of survey proceedings/ some documents pertaining to you were found and impounded. A copy of all such documents has already been given to you. Considering your reply dated 29.7.2009/ your returns tiled u/s 139 and the documents found and seized during the course of survey are considered as the material available on record and it is proposed that assessment would be completed by affording you of an opportunity of being heard to state your case and to explain the documents found and impounded during the course of survey U/s133A of the IT. Act, by way of issue of this notice u/s 142(1).)”

6.1 Finally, the AO vide letter dated 17.08.2009 informed the assessee that the assessment would be completed on the basis of the return of income and other material impounded during the survey action for want of any compliance on the part of the assessee, However, the assessee did not file any explanation on the impounded material and reiterated that the service of notice u/s 148 by affixture is not valid. Thereafter, adjournment was sought by the appellant on 17.08.2009 and subsequently which were allowed by the AO. The details of adjournment sought by the assessee, which were allowed by the AO, are elaborately discussed in Para 7 of the assessment order and the relevant finding in this regard is as below :

7. An adjournment was S011glu for on 17.8,2009 and the date was fixed for 20.8.2009. Again on 20.8"-2009, adjournment was requested and the case was adjourned for 27.8.2009. Again on 27.8.:2009. adjournment was sought for and the case was adjourned to 2.91.200J. None attended on

2.9.2009 and no submission "pas furnished. Again a notice U/s 142(1)) and notice U/s 274 r. w. s. 271 (1) (b) was issued on 20.10.2009, fixing the case for hearing on 30, 10.2009 and also a summons U/s 131 was issued on 27.10.2009 to produce all the documents called for vide notices issued U/s 142(1). As expected, no documents, as called for. vide notices issued U/s 142(1) were filed. On 3.11.2009, the assessee attended without any of the documents called for by the Department. Still, a statement U/ s 131 was recorded and the assessee was specifically asked to produce all the documents latest by 6.11.2009. The assessee assured to explain all the impounded documents on 6.11.2009 but neither the assessee nor the Counsel for the assessee attended nor any explanation/documents were filed, except for adjournment letter. ”

6.2 Since the assessee failed to comply with the statutory notices issued by the AO during the assessment proceedings and also failed to file the explanation on the impounded material found during the survey action, the AO, therefore proceeded to complete the best judgement assessment u/s 144 of the I.T. Act, 1961. The AO, after having analysed the material available on record including the impounded material, made the additions of Rs.6,80,690/- under the head “Income from Business” and Rs.14,61,900/- under the head “Income from other sources”, Rs.28,000/- under the head “Income from House Property”, Rs.25,000/- under the head “Income from documentation work” and Rs.1,30,000/- under the head “Income from other sources” as it is unexplained investment. The AO has discussed the issues on the basis of which the additions were made in Para Nos. 10 to 18 of the assessment order.

7. It is quite manifest from the above that there was a proper service of notice u/s 148 of the Act. The appellant refused to accept the notice from the Notice Server who visited the business premises of the assessee, therefore, the AO deputed an Inspector to effect the service of notice. Since, the staff of the appellant present at the business premises also refused to accept the statutory notice u/s 148, therefore the authority concerned was not left with any alternative to effect service other than by way of affixture. The reports of the Inspector and the Notice Server are duly found placed on record, which clearly reveal that the appellant and the staff present at the business premises had shown their total reluctance to accept the statutory notice from the authorities. The AR of the appellant has not brought out any evidence contrary to the facts available on record. The facts available on records including the relevant reports clearly demonstrates the non-co-operative attitude of the appellant. The fact that the AO for want of compliance from the appellant was constructed to pass the assessment order

ex-parte u/s 144 of the Act, also shows the non-co-operative approach of the appellant towards official proceedings. It is perused from the record that ample opportunities were conferred upon the appellant to explain the contents of the impounded material found during the survey action, but the appellant chose not to avail such opportunities. The ratio of the decisions relied upon by the appellant is not applicable to the facts of the case of the appellant. The facts of the case make it abundantly clear that there was no procedural lapse in service of notice u/s 148 of the Act. The service through Notice Server is the most preferred mode of service prevalent in the department followed by the Service by Post and affixture. In the case of present appellant, the initial conduct of the appellant itself was non co-operative; therefore, the AO had rightly adhered to the mode of service by affixture. The ultimate motto of the AO was to serve upon the appellant a valid notice, which was initiated through the Notice Server and it is but for the non-operation of the assessee and the staff, the alternate methods of service of notice were adhered to. It is not a case where service through Notice Server would have caused any genuine hardship to the assessee. It is, therefore, immaterial from the point of view of assessee whether notice is served on him through Notice Server or by Post. What is material is that a valid notice should be served upon the assessee. Since there was a Survey action conducted at the business premises of the assessee, which has resulted into impounding of certain incrimination papers and documents, onus therefore, was on the appellant to explain the contents of such impounded material, which he has failed to discharge by not accepting a valid notice issued and served on him by the AO. The appellant, thus, has refrained from availing an opportunity conferred upon him in the interest of principles of natural justice due to which AO was constrained to pass ex-parte order u/s 144 of the Act. I, therefore, hold that the service of notice u/s 148 was a valid service through affixture, in the facts and circumstances of the case, therefore, the AO has assumed a valid jurisdiction to pass order u/s 144 r.w.s. 147 of the Act.”

11. Against the above order the assessee is in appeal before the ITAT.

12. The contentions of the learned counsel of the assessee are summarized as under :

“A) AO has observed that notices u/s 148 of I.T. Act, 1961 are served by affixture on 26/03/2009. In the assessment proceeding assessee has submitted before A.O. that notice i/s 148 are not served. A.O. has noted the submission of assessee at para 5 & 7 of assessment order. A.O. without disposing the objection of assessee

as to service of notice u/s 148 and not providing reasons recorded for notice issued u/s 148 proceeded to frame assessment u/s 144 of I.T. Act, 1961.

- B) Submitted before A.O. that notice u/s 148 is not served –
- | | |
|---------------|----------------------|
| On 21/07/2009 | A.O. Page-2, Para-4 |
| On 29/07/2009 | A.O. Page-2, Para-4 |
| On 17/08/2009 | A.O. Page-3, Para-5 |
| On 23/11/2009 | A.O. Page-4, Para-8. |
- C) Before Hon'ble CIT(A) it was submitted that notice is not served on assessee and he has never refused to receive service of notice from his side. CIT(A) Order Page-2.
- D) Notice u/s 148 were never refused by assessee or his agent for service. Assessment years under consideration are 2003-04 to 2005-06. Survey u/s 133A was made on 24/11/2008. Notice u/s 148 are issued on 26/03/2009. Affixture is made on 26/03/2009. Enough limitation to serve the notice u/s 148 of I.T. Act 1961 was available with A.O. of more than one years for Asstt. Year 2003-04 and for other years much more than that A.O. has hurriedly resorted to process of affixture for no valid justification.
- E) Reasons recorded not provided to assessee by learned A.O. and even by Hon'ble CIT(A).
- | | |
|------------------------------------|----------------------|
| Request made before A.O. | on 25/01/2010 |
| | A.O. Page-4, Para-8. |
| Request made before Hon'ble CIT(A) | 19/11/2010 |
- F) Reliance on W/s before CIT(A) CIT(A) Page-2&3.
- G) It is settled position of law that service of notice u/s 148 on assessee is to demonstrate by revenue on challenge of same by assessee by adducing legal evidence. Onus is on revenue to establish valid service of notice u/s 148 on assessee to assume jurisdiction.

Reliance on:

- i) (2000) 242 ITR 0141 (Mad) Venkat Naicken Trust & Anr.

Vs. ITO.

H) Subsequently 142(1) notice were sent by RPAD as is evident from observation of A.O. at page 2. Assessee has responded before A.O. and submitted objection for service of notice. Assessee had requested for adjournment before A.O. as is evident from observation at para 8. A.O. has also recorded statement of assessee in assessment proceedings u/s 131 of I.T. Act, 1961. All 142(1)/143(2) notices and summons were received by assessee and responded to in assessment proceedings. Nothing on record that assessee is avoiding service of notice of department.

I) In the case of assessee service of notice u/s 148 of I.T. Act, 1961 is observed to be by A.O. by way of affixture. The valid service of notice by affixture can be only by following Provisions of Order V of Civil Procedure Code 1908.

J) In the case of assessee it was submitted that there is no valid service of notice by affixture and thus notice u/s 148 cannot be said to have been served on assessee.

K) Provisions of sec. 282 of I.T. Act 1961 provide for manner of service of notice. Undisputed fact that notice has not been served in person on assessee nor it has been served by post.

L) Provisions of Rule 17 to 20 of Order V of Civil Procedure Code 1908 provide for procedure of service of notice by affixture. Evidence on record would show that provisions of rules of Order V of Civil Procedure Code 1908 are not complied to conduct that valid service of notice u/s 148 has taken place.

M) A.O. has not made reasonable attempts to service notice in regular manner and was not justified to resort to make substituted service of notice. Even alleged substituted service of notice is not in accordance with law and is no valid service of notice u/s 148 of I.T. Act 1961.

Reliance on:

- i) ITAT order in ITA No. 289(Asr)/2013 in the case of Sh. Parshotam Singh vide order dated 04/08/2016.
- ii) ITAT order in ITA No. 1111/PN/2013 in the case of Anil Khatri vide order dated 31/03/2016.
- iii) ITAT order in ITA No. 5221/Mum/2014 in the case of Shri Sanjay Badani vide order dated 09/09/2014.

- iv) (2015) 43 ITR (Trib) 0635 (Delhi) Sumanglam Sewa Awam Educational Samiti vs. CIT.
- v) (2010) 328 ITR 0173 (P&H) CIT vs. Kishan Chand.
- vi) (2010) 1 ITR 0001 (Agra) Arun Lal vs. ACIT.
- vii) (2008) 296 ITR 0333 (Delhi) CIT vs. Hotline International (P) Ltd.
- viii) (1973) 89 ITR 0136 (All.) CIT vs. Satya Narain Poddar.
- ix) (1977) 110 ITR 0027 (All.) Jagannath Prasad & Ors. Vs. CIT & Ors.
- x) (1971) 82 ITR 0888 (SC) CIT & Ors. Vs. Ramendra Nath Ghosh.
- xi) (1973) 88 ITR 0374 (Cal.) Rameswar Sirkar vs. ITO.
- xii) (2000) 242 ITR 0141 (Mad.) Venkat Naicken Trust & Anr. Vs. ITO.

N) Inspection of record by assessee revealed that there is no report of notice server to the effect there was any refusal to receive notice by assessee.

O) Inspectors report is not verified by affidavit of service nor A.O. has examined inspector on oath as required under Rule 19 of Order V of Civil Procedure Code 1908. The A.O. having not followed the provisions of Rule 19 there is no valid service of notice u/s 148 of I.T. Act, 1961.

P) Assessment record does not indicate that A.O. has declared that notice u/s 148 is served in the case of assessee in terms of Rule 19 of Order V of Civil Procedure Code 1908. Then no valid service can be said to have been made in the case of assessee.

Q) In the report of Inspector names of two witness are referred. The address of such witness indicates that both the witnesses are almost 6 Kms. away from the premises of assessee in opposite direction from each other. Report of Inspector does not states that witnesses have identified the place or was known to him personally. Alleged service is not in accordance with law.

R) Provisions of Rule 19 are not complied with in the facts in the case of assessee. No evidence was shown to assessee on the basis of which it can be said that service was in accordance with law.

S) Mere information of notice issued u/s 148 is not sufficient to assume jurisdiction to assess u/s 148 of I.T. Act 1961.

Reliance on:

i) (1977) 107 ITR 0409 Johar Forest Works vs. CIT.

T) Observation of CIT(A) that no procedural lapse in service of notice u/s 148 is contrary to evidence on record. Ratio of decision relied upon before CIT(A) are clearly applicable to the facts in the case of assessee.

U) Reasons recorded not provided to assessee. Non providing of reasons recorded before completion of assessment results into assessment framed as bad in law and deserves to be quashed.”

13. Per contra learned D.R. relied upon the orders of the authorities below.

14. I have carefully considered the submissions and perused the records. I find that notice u/s 148 issued in this case is dated 26-03-2009. It has been claimed that the assessee has refused to accept the notice and hence affixture was made on 26-03-2009 itself. In this regard before proceeding further I may gainfully refer to the relevant laws relating to service of notice in this regard as under :

“[Service of notice generally,

282.(1) The service of notice or summon or requisition or order or any other communication under this Act (hereinafter in this section referred to as “communication”) may be made by delivering or transmitting a copy thereof, to the person therein named –

(a) by post or by such courier services as may be approved by the Board;
or

(b) in such manner as provided under the Code of Civil Procedure, 1908

(5 of 1908) for the purposes of service of summons; or

(c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or

(d) by any other means of transmission of documents as provided by rules made by the Board in this behalf.

(2) The Board may make rules providing for the address (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) may be delivered or transmitted to the person therein named.

Explanation – For the purposes of this section, the expressions “electronic mail” and “electronic mail message” shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000).

15. Issue and service of summons as per Code of Civil Procedure

“1. Summons

(1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified:

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim:

[Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons.]

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear-

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

2. Copy or statement annexed to summons

Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

3. Court may order defendant or plaintiff to appear in person

(1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

4. No party to be ordered to appear in person unless resident within certain limits

No party shall be ordered to appear in person unless he resides-

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

5. Summons to be either to settle issues or for final disposal

The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

6. Fixing day for appearance of defendant

The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the serves of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

7. Summons to order defendant to produce documents relied on by him

The summons to appeal and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

8. On issue of summons for final disposal, defendant to be directed to produce his witnesses

Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Service of Summons

9. Delivery or transmission of summons for service

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or

has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

10. Mode of service

Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

11. Serves on several defendants

Save as otherwise prescribed, where there are more defendants than one, serves of the summons shall be made on each defendant.

12. Service to be on defendant on person when practicable, or on his agent

Wherever it is practicable serves shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case serves on such agent shall be sufficient.

13. Service on agent by whom defendant carries on business

(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of serves, personally carries on such business or work for such person within such limits, shall be deemed good service,

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or chartered .

14. Service on agent in charge in suits for immovable property

Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

23[15. Where service may be on an adult member of defendant's family

Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on his at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation.- A servant is not a member of the family within the meaning of this rule.]

16. Person served to sign acknowledgement

Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

17. Procedure when defendant refuses to accept service, or cannot be found

Where the defendant or his agent or such other person as aforesaid refuses to sign the

acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, 22[who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person(if any) by whom the house was identified and in whose presence the copy was affixe~

18. Endorsement of time and manner of service

The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. Examination of serving officer

Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

22[19A. Simultaneous issue of summons for service by post in addition to personal service

(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has been received by the Court within thirty days from the date of the issue of the summons].

20. Substituted services

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house(if

any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

22[(1A) Where the Court acting under sub-rule(1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service-Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed -Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

16. In this regard I may further gainfully refer the following case laws:

(1) CIT vs. Ramendra Nath Ghosh 82 ITR 888 (SC):

(Head Notes only)

“Admittedly the assesseees have not been personally served in these cases. Therefore, one has to see whether the alleged service by affixation was in accordance with law. The contention of the assesseees was that at the relevant time they had no place of business. The report of the serving officer does not mention the names and addresses of the person who identified the place of business of assesseees. That officer does not mention in his report nor in the affidavit filed by him that he personally knew the place of business of the assesseees. Hence, the service of notice must be held to be not in accordance with the law. The possibility of his having gone to a wrong place cannot be ruled out. The High Court after going into the facts of the case very elaborately, after examining several witnesses, has come to the conclusion that the service made was not a proper service. Hence, it is not possible to hold that the assesseees had been given a proper opportunity to put forward their case as required by s. 33B. Ramendra Nath Ghosh vs. CIT (1967) 66 ITR 414 (Cal) : TC57R affirmed.

Notice –Service by affixture-Validity-Name of person who identified assessee’s business premises not mentioned in the report of Inspector-Inspector also did not claim personal knowledge of assessee’s premises – Service of Notice by affixture is invalid.”

2) CIT vs. Kishan Chand. 328 ITR 173 (P&H):

“The assessee is individual and as a sequel to the search and seizure operation was conducted on his premises, he filed revised return. The AO framed assessment under s. 144 of the Act on the basis of best judgement assessment. The CIT(A) accepted the appeal mainly on the ground that the assessee had not been served. Evidence with regard to

service of affixture was rejected on the ground that resort to affixture could not be straightaway taken without first taking other modes of service. The Tribunal affirmed the said finding. It was observed :

“From the facts of the case, I find that the search and seizure operations had been taken at the business and residential premises of the appellant as far back as August, 1976, and the income of the asst. Yr 1969-70 could be assessed by issuing a notice by 31st March, 1978. Notice under s. 148 was issued on 23rd March, 1978, and the ITO was naturally anxious to see that the notice gets served by 31st March, 1978. Though he meticulously complied with all the formalities prescribed with regard to the service of notice through the affixture yet the hurry which he had to make is quite apparent. As pointed out, search had taken place in the year August, 1976, and when no action had been taken up to 23rd March, 1978, taken recourse to service by affixture can be said only a sheer formality and not the real service as held by their Lordships in different judgments of the different High Courts, referred to above.

3. Learned counsel for the Revenue is unable to show that there was any refusal of the assessee to accept service as has been assumed in the question referred. On the other hand, the Tribunal has categorically held that no other mode was adopted and steps for service of notice were taken about a week before the time was expiring.”

3) CIT vs. Hotline International (P)Ltd. 296 ITR 333.

“As per order 5, r. 12 of the CPC, wherever it is practicable, the service has to be effected on defendant in person or on his agent. Admittedly, in the present case, notice under s. 148 was not tendered to the assessee nor the same was refused at all by the assessee. It is an admitted case of Revenue that when the officials of the IT Department went to serve the notice under s. 148 for the asst. Yr. 1995-96, the security guard informed them that the company was closed for Holi festival holidays. The security guard by no stretch of imagination can be said to be the agent of the assessee and admittedly no notice was tendered either to the assessee or his agent nor the same was refused either by the assessee or his agent. Under order 5, r. 17 of the CPC, the affixation can be done only when the assessee or his agent refuses to sign the acknowledgement or could not be found. Here, in the present case, no effort was made by the IT Department to serve the notice upon the assessee, since the company of the assessee was closed due to Holi festival holidays, and admittedly no effort was made by the serving officer to locate the assessee. Even otherwise, as per order 5, r. 19A of the CPC, the notice sent by registered post ought to have been sent along with acknowledgement due, but admittedly, it was not sent with acknowledgement due. So, from the entire material available on record there is no hesitation in holding that there has been no valid service of notice under s. 148 upon the assessee as the same was neither tendered to the assessee or his agent, nor the same was refused by either of them. Since there has been no proper service of notice on the assessee, the reassessment proceedings, resulting in the order dt. 30th Jan. 2003, are bad in law.

Conclusion:

There was no valid service of notice under s. 148 where it was not tendered to assessee or his agent nor refused by them, no effort was made by serving officer to locate the assessee before affixation and notice sent by registered post was not accompanied by acknowledgement due, hence reassessment was bad in law.”

17. Now I examine the present case on the anvil of the aforesaid case laws.

In this case it is the claim of the Revenue that notice u/s 148 was issued on 26-03-2009. Upon refusal of the assessee to receive the notice, affixture was also made on the same date i.e. 26-03-2009. In this regard it is the contention of the assessee that the notice was never served on the assessee or his agent. This aspect has been repeatedly agitated by the assessee before the AO as well as the CIT(Appeals). Examination of the materials produced in this regard do not reflect any effort on the part of the AO to service the notice by post or by other ordinary means of service as required by section 282. This fact is evident from the date of issue of notice and the date of affixture being the same. The above clearly reveals that the AO has not taken reasonable steps to serve the notice in the ordinary course. Thus as in the case of CIT vs. Kishan Chand before the Hon'ble Punjab & Haryana High Court, in this case also no other mode was adopted and steps of service of notice was taken except reportedly through the affixture about few days before time was expired. Thus it is clear that the AO has not made regular attempts for service of notice in regular manners and was not justified to make substituted service of notice. There is no report of notice server to the effect that there was any refusal of notice by the assessee. In the report of Inspector, names of two witnesses are referred. The addresses of the witnesses are far away from the premises of the assessee. The report of the Inspector does not state that witnesses have identified the place or was known to them personally. As a matter of fact despite assessee's repeated submission that notice has not been served properly, the AO has not bothered to serve the notice upon the assessee or his agent even though there was adequate time for the said service of notice through the ordinary means for subsequent years. This clearly shows a scan't regard on the part of the assessee to the legal procedures. It is settled law including that from the Hon'ble Apex Court in the case of CIT vs. Ramendra Nath Ghosh (supra) that in absence of proper service of notice the assessment procedure lose their validity.

18. In these circumstances on the conspectus of above factual scenario and the and case laws, I am of the considered opinion that in this case notice dated 26-03-2009 claimed to have been served by

affixture is not at all a valid notice as mandated by law. In these circumstances I have no hesitation in holding that the said affixture is in utter disregard of the Rules of Law and hence I hold that in absence of proper notice the assessment order is void ab initio. Since I have already quashed the assessment for lack of service of notice, adjudication and other limbs of learned counsel's submission on jurisdiction as well as on merits are now only of academic interest. Hence I am not engaging into the same."

7. Since it is undisputed that the facts are identical and it is also not the case that Hon'ble jurisdictional High Court has reversed the above decision of this Tribunal, following the precedent, we hold that in absence of proper notice the assessment orders in these cases are void abinitio.

8. Since we have already quashed the assessment for lack of service of notice, the adjudication on other grounds and other limbs of learned counsel's submission on jurisdiction as well as on merits are now only of academic interest. Hence we are not engaging into the same.

9. In the result, these appeals by the assessee stand allowed as above.

Order pronounced in the Open Court on this 27th day of March, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER.

Nagpur,
Dated: 27th March, 2017.

Copy forwarded to :
1. Smt. Nalini Shyam Moundekr Golibar Chowk, Nagpur.
2. I.T.O., Ward-4(1), Nagpur.
3. CIT(Appeals)-I, Nagpur.
4. C.I.T.-I, Nagpur.
5. D.R., ITAT, Nagpur.
6. Guard File

True Copy

By Order

Assistant Registrar,
Income Tax Appellate Tribunal,
Nagpur Bench, Nagpur.

Wakode.